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Supreme Court, U.S.
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No. 99-1015

IN THE

Supreme Court of the United States

JONATHAN D. MAURO,
Petitioner,

v.

JOSEPH M. ARPAIO and MARICOPA COUNTY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In place of the First Amendment questions posed in the Petition, Respondents urge consideration of the following questions:

1. Does Petitioner lack standing to challenge the jail policy as facially overbroad?

2. Is the Maricopa County jail policy's prohibition against inmate possession of "sexually explicit" materials reasonably related to a legitimate penological interest under *Turner v. Safley*, 482 U.S. 78 (1987)?

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The Respondents Joseph M. Arpaio and Maricopa County respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit Court of Appeals' *en banc* opinion filed August 17, 1999.

COUNTERSTATEMENT OF THE CASE

A. The Jail Policy Was Adopted in 1993 to Combat Sexual Harassment Directed at Female Detention Officers, to Ensure the Safety of Inmates and Officers, and to Promote the Rehabilitation of Convicted Inmates.

Respondents agree with and incorporate by reference the facts outlined in the Ninth Circuit's *en banc* opinion. (Pet. App. 2a-3a). These facts emphasize: (1) the rea-

sons underlying adoption of the jail policy in 1993; (2) the language of the policy itself; (3) the undisputed fact that adoption of the policy has resulted in a "sharp decrease in the number of problems encountered;" and (4) Petitioner's sole dismay at the policy because of the denial of his subscription to *Playboy* while he was incarcerated in the Maricopa County jail system.

B. The Petition's Characterization of the Decisions Below.

Dissatisfied with the District Court's summary judgment ruling and the Ninth Circuit's ultimate *en banc* opinion, the Petition distorts those rulings by selectively quoting from them while relying heavily on the dissenting opinions and the initial three-judge panel decision. (Pet. at 6-11). While Petitioner's primary motive in doing so is to emphasize the breadth of the policy banning "sexually explicit" materials from the jail, the Petition overlooks key findings and conclusions made by judges who have reviewed the jail policy and rejected Petitioner's constitutional challenge to it.

The greatest fallacy in the Petition is its continued fascination with the theory that the jail policy is unconstitutionally overbroad because it may (theoretically) exclude artistic or scientific publications. The Petition repeatedly stresses the scope of the policy banning all "sexually explict" materials which depict "full frontal nudity," yet never attempts to grapple with footnote 4 of the *en banc* opinion. This footnote emphasizes that prison regulations do not need to pass the "least restrictive alternative test" to withstand constitutional scrutiny. So long as the regulation withstands the *Turner* reasonableness test, it will be deemed constitutional regardless of any overbreadth concerns. (Pet. App. 8a, n.4).[1]

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[1] The Petition also fails to note a key aspect of the evolution of appellate review in this case. After the Ninth Circuit's three-judge

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The Petition also overlooks specific findings of waiver and evidentiary problems in the case. Specifically, the Petition ignores the following:

- The district court's finding that "Mauro has been unable to document a single instance in which a prisoner's request for a copy of *National Geographic*, or any other 'scientific' publication, has been refused because of content" (Pet. App. 9a, n.4);
- The conclusion of the *en banc* court that Petitioner had failed to raise in his briefs the issue of whether the policy was enacted to punish pre-trial detainees (Pet. App. 6a, n.2);
- The conclusion of the *en banc* court that Petitioner had raised issues on appeal (relating to whether reasonable alternatives existed to address the jail officials' concerns) that had not been raised in the district court (Pet. App. 13a, n.6);
- Judge Kleinfeld's dissent acknowledging that potential hearsay problems existed concerning quotations attributed to Respondent Arpaio in a magazine article (Pet. App. 27a-28a).[2]

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panel had found the jail policy substanially overbroad in prohibiting inmate possession of scientific and artistic publications such as *National Geographic*, Respondents filed a petition for rehearing and suggestion for rehearing *en banc*, pointing out the court's error in concluding that "Mauro need not prove substantial overbreadth in a pure speech case." *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982) (substantial overbreadth requirement applies to "pure speech" cases); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). After receipt of the petition for rehearing, the three-judge panel took the unusual step of withdrawing this portion of its opinion on September 1, 1998 before even allowing Petitioner Mauro the opportunity to respond. This confession of error by the three-judge panel was followed by the *en banc* opinion's rejection of Petitioner's overbreadth argument.

[2] Beyond hearsay problems associated with this 1995 article, Petitioner has never confronted the reality that the statements at-

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These oversights by Petitioner demonstrate that the record in this case is anything but clear. As found by the district court and the Ninth Circuit, Petitioner has not properly preserved issues in the record. Worse yet, his Petition wholly fails to confront the preliminary issue of whether traditional overbreadth analysis is encompassed within the flexible *Turner* analysis.

REASONS FOR DENYING THE WRIT

I. PETITIONER LACKS STANDING TO MOUNT A FACIAL OVERBREADTH CHALLENGE TO THE JAIL POLICY

What Petitioner labels as the "unprecedented breadth" of the jail policy is not properly before this Court. There are two independent reasons why Petitioner lacks standing to challenge the facial breadth of the jail policy.

First, the Petition fails to even acknowledge the existence of the substantial overbreadth doctrine in traditional First Amendment cases. To enable a court to entertain a facial overbreadth challenge, the First Amendment litigant must demonstrate that the risk of an overbroad application of the statute or policy is both real and substantial. *Broaderick*, 413 U.S. at 615; and *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (for a challenged regulation to be deemed substantially overbroad, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court. . . ."). *See also Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 61

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tributed to Respondent Arpaio were nearly two years *after* the 1993 adoption of the policy. As conceded in the Petition, the reasons behind adoption of the policy were set forth in a contemporaneous memorandum prepared by the sheriff's office in August of 1993. (Pet. at 3)

(1976) ("Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.")

To the extent it applies, this First Amendment doctrine compels the conclusion that an inmate who is denied a subscription to *Playboy* magazine (and fails to offer any evidence that other inmates have been denied artistic or scientific publications under the policy) has standing to challenge only the policy's application with respect to the denied *Playboy* subscription.

Second, the overbreadth doctrine is not even applicable in jail/prison cases under the *Turner* analysis. The theoretical exclusion of artistic or scientific journals does not independently render a jail policy unconstitutional, so long as the policy satisfies the *Turner* reasonableness test. *Thornburg v. Abbott*, 490 U.S 401, 414 (1989) ("we prefer the express flexibility of the *Turner* reasonableness standard."); and *Lewis v. Casey*, 116 S. Ct. 2174, 2179-84 (1996) (prisoner seeking to enjoin the operation of a prison policy must demonstrate its unconstitutional application to him rather than to third-parties not before the court). *See also Waterman v. Farmer*, 183 F.3d 208, 212-13 (3rd Cir. 1999) ("the substantial overlap between the *Safley* test and the doctrines of vagueness and overbreadth suggests that the Supreme Court did not intend for those doctrines to apply with independent force in the prison-litigation context.")

Thus, to the extent the Petition challenges the scope of the jail policy and its hypothetical exclusion of artistic and scientific publications, Petitioner lacks standing to as-

sert such an overbreadth challenge. Because the predominant concern of the Petition is the breadth of the jail policy rather than its specific application to the denied *Playboy* subscription of Petitioner, certiorari should be denied on this basis alone.

II. THE WRIT SHOULD BE DENIED BECAUSE THE *EN BANC* OPINION CORRECTLY ANALYZES AND APPLIES THE *TURNER* REASONABLENESS TEST

The Petition seeks to manufacture a conflict that does not exist. Citing to the *Turner* and *Thornburgh* decisions of this Court, the Petition contends that the *en banc* opinion's "interpretation of the reasonableness test conflicts with *Turner*." (Pet. at 24). It does not. The *Turner* reasonableness test is, as its name suggests, case-specific. The Ninth Circuit's *en banc* opinion did not proclaim any new principles of law or seek to undermine *Turner* in any way. Instead, the opinion simply applied the *Turner* reasonableness analysis to a jail policy based on the record before the court. The district court found the jail policy reasonably related to Maricopa County's legitimate penological interests and the Ninth Circuit affirmed that ruling on appeal.

Petitioner's chief complaint appears to be that "none of the safeguards that comforted this Court in *Thornburgh* is present here." (Pet. at 19). Petitioner emphasizes that the Maricopa policy does not allow any exceptions similar to the Bureau of Prisons' policy before this Court in *Thornburgh*. Petitioner's reading of *Thornburgh* is that prison authorities must, at a minimum, either "provide individualized consideration of requested materials so as not needlessly to exclude benign materials that are otherwise protected by the First Amendment, or narrow the category of restricted materials to achieve the same results." (Pet. at 20). *Thornburgh* does not establish the

outer limits of what prison authorities may do in regulating the First Amendment rights of inmates in their custody.

First, the Bureau's policy challenged in *Thornburgh* was brought in the context of a class action in which 46 publications had been banned by operation of the policy. Petitioner Mauro, by contrast, stands alone (so far as the record shows) in his desire to obtain a *Playboy* subscription and failed to present any evidence that inmates have ever been denied artistic and scientific publications.

Second, while the safeguards alluded to by Petitioner in the *Thornburgh* case may have "comforted" this Court in reaching its conclusion, there is nothing in the *Thornburgh* opinion to suggest that such safeguards are constitutionally compelled. Indeed, the same Federal Bureau of Prisons whose regulations withstood scrutiny in the 1989 *Thornburgh* decision changed its policies in 1996, making them more restrictive by banning certain "sexually explicit" materials. This more restrictive policy of the Bureau was recently upheld by a federal appeals court in *Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 2392 (1999).

Unlike the prison authorities in *Thornburgh*, the record here establishes that jail officials were facing (among other things) a sexual harassment problem in 1993 that had become increasingly difficult to avoid without the adoption of measures to curb the flow of pornography to inmates. Female detention officers on their work shifts had been sexually harassed by male inmates with the inmates using the sexually explicit pictorials to fuel their fantasies. Adoption of the policy by state jail authorities was precisely the type of "innovative solution[] to the intractable problem[] of prison administration" for which Article III deference is required. *Turner*, 482 U.S. at 89. Maricopa jail officials were not required to adopt the "least restric-

tive alternative" as the only acceptable method for solving the problem at hand.[3]

The *Turner-Thornburgh* test is case-specific, involving questions of whether the particular prison or jail policy is reasonably related to legitimate penological interests. Focusing on the rights of Petitioner, the Ninth Circuit's *en* banc opinion correctly analyzed the *Turner* issue and upheld the policy as reasonably related to Maricopa County's legitimate interests. The Ninth Circuit's opinion faithfully adheres to this Court's *Turner-Thornburgh* test and does not conflict with any other circuit opinions.

The Petition, however, contends that the Ninth Circuit is now in conflict with decisions from the Sixth, Seventh, and Eighth Circuits. The only "conflict" identified by the Petition is that the *en banc* court shirked its "obligation to weigh all relevant factors. . . ." (Pet. at 26). The circuit opinions cited in the Petition to support this asserted conflict do not even involve sexually explicit materials but rather prison regulations infringing on inmate religious freedoms or foreign language rights. *See generally Salaam v. Lockhart*, 905 F.2d 1168 (8th Cir. 1990) *cert. denied*, 498 U.S. 1026 (1991); *Kikumura v. Turner*, 28 F.3d 593 (7th Cir. 1994), *cert. denied*, 514 U.S. 1005 (1995); and *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989). Simply because the jail policy here passed the *Turner test*

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[3] As emphasized throughout the proceedings below, courts have found the existence of a hostile work environment where pictures of nude women and sexual slurs abound. *See EEOC Compliance Manual* § 614, ¶ 3114(C)(1) at 3274 (1990). *See also Robinson v. Jacksonville Ship Yards, Inc.*, 760 F. Supp. 1486 (M.D. Florida 1991); *Sanchez v. City of Miami Beach*, 720 F. Supp. 974, 977 (S.D. Florida 1989). Moreover, 29 C.F.R. § 1604.11(e) provides that an "employer may . . . be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate action."

while other (completely unrelated) prison policies have flunked the *Turner test* does nothing to present a conflict in circuit authority. The *Turner* test is preferred for its flexibility; it is neither designed for nor capable of providing the type of mechanical application demanded by Petitioner.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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